IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 43

LESTER J. ALBRECHT, Petitioner,

v.

THE HERALD COMPANY, a Corporation [illegible]
GLOBE-DEMOCRAT PUBLISHING COMPANY [illegible]

On Writ of Certiorari to the United States Court of Appeals [illegible]
for the [illegible] Circuit

BRIEF OF AMERICAN NEWSPAPER [illegible]
[illegible]

INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 43

LESTER J. ALBRECHT, *Petitioner*

v.

THE HERALD COMPANY, a Corporation, d/b/a GLOBE-DEMOCRAT PUBLISHING COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AS AMICUS CURIAE

By consent of the Petitioner and Respondent herein, the American Newspaper Publishers Association files this brief as Amicus Curiae, in support of the decision of the United States Court of Appeals for the Eighth Circuit affirming the judgment for the

Respondent, The Herald Company, entered without opinion by the United States District Court for the Eastern District of Missouri, on a jury verdict. The opinion of the Court of Appeals is reported at 367 F.2d 517.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Its membership consists of 1,002 daily newspapers, whose publications represent more than 90% of the total daily and Sunday circulation of newspapers published in this country.

The Association's members are vitally interested in the basic issue herein, namely, whether a publisher may, pursuant to its interest in maximum circulation, sell its newspaper directly or to more than one distributor in areas where circulation is threatened by overpricing.

A substantial number of the Association's members utilize independent adult carriers for distribution to home subscribers. Home subscriptions, moreover, are estimated to account for over 80% of newspapers' total circulation. In submitting this brief, the Association wishes to assure its members that they may continue to publish suggested prices and subscription rates conducive to orderly and economic circulation.

BACKGROUND

Newspapers generally utilize four basic means of accomplishing distribution to their readers. One is by newspaper boy; another is second class mail; a third is by newsstands sales, and a fourth is by adult carriers

or distributors, who purchase their newspapers and then bill the subscribers on their route for their own account. Considerations of distribution efficiency have usually led to the creation of exclusive areas of delivery, or routes. In these areas, there is ordinarily no competition among the adult carriers, although copies are also sold by stores, racks and street corner salesmen in these areas.

A large percentage of newspapers' circulation, however, is made up of home deliveries. These subscribers constitute the most stable element in a newspaper's circulation, and for this reason, newspapers expend considerable time and effort to increase these subscriptions. Many new subscriptions are phoned into newspapers' offices directly, as a result of the image and good will the newspaper has been able to establish in its community over the years. But most newspapers also conduct active publicity campaigns of varying sorts to acquire new subscriptions. These include premiums, trips, introductory offers, visual advertising, and telephone solicitation supported directly by the newspaper. Frequently, deliverers, whether adult or newspaperboys, are given premiums or bonuses for each new subscription brought in. Ultimately, subscribers lists are the result of long years of careful attention and large financial outlay by newspapers. Where the business in a given area is not large enough to pay a carrier for delivery, newspapers have protected their investment by paying the carrier until the difference between the established buying and selling prices of the papers would afford satisfactory pay. See *Journal of Commerce Publishing Co. v. Tribune Co.,* 286 Fed. 111 (7th Cir. 1922).

Unlike the usual industry for which revenue, with given production costs, is determined by market demand for the product balanced against the market price for the product, newspapers are a service whose net revenue is dominated by a wholly different factor: advertising. The market demand for newspapers, at least in today's market, will not sustain a circulation sales price even approximating the cost of publication.

In 1966, the newsaper market supported 1,848 newspapers at 10¢ per daily copy or under, and only seven newspapers at more than 10¢ per daily copy (not to mention "shoppers" distributed free).[1] At 10¢ per copy, even disregarding soaring costs of labor and machinery, many newspapers did not even pay the cost of their newsprint and ink from circulation revenues. A typical daily newspaper in the 240,000 circulation range spent in 1966 $4,411,283.05 on newsprint and ink, while it received only $2,948,318.24 in total circulation income.[2] This has frequently been the situation since the advent of daily newspapers in this country.[3]

Statistics accumulated by the Amicus Curiae indicate that approximately 25% of the gross revenues of member newspapers were derived from circulation, while almost 75% were derived from advertising.[4] In these circumstances, it must be concluded that the

---

[1] American Newspaper Publishers Association, Gen. Bulletin, Feb. 8, 1967, at 54 (includes Canada, U.S. Virgin Islands, Bermuda, Puerto Rico and West Indies).

[2] EDITOR & PUBLISHER, April 1, 1967, at 14.

[3] LEE, THE DAILY NEWSPAPER IN AMERICA 273 (1937).

[4] See also EDITOR & PUBLISHER, April 1, 1967, at 14; *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 604 (1953).

primary "product", in any meaningful business sense, is advertising, not the paper distributed by the carrier.

Thus, revenues in the newspaper business are not directly determined by the market demand for the newspaper, but rather are principally determined by the market demand for advertising space. The price of daily newspapers has never been, and cannot be, determined by the market for circulation of the newspaper. On the contrary, pricing policies must be determined by the relevant market considerations for advertising.

Circulation (as opposed to circulation income) is such a consideration and is therefore of controlling importance to newspapers, for the reason that advertising rates are governed by circulation. Advertisers view newspaper rates from a "per inch per thousand circulation" basis, and all newspapers reflect circulation in their rate structures. Thus the average line rate for a newspaper of 50,000 is 22.1¢; for a newspaper of 100,000, 34.8¢; for one of 200,000, 56.1¢, and for 500,000 $1.169.[5]

For this reason, every newspaper has a vital concern for circulation which goes far beyond its income producing capacity, as a result of sales. This capacity, as has been pointed out, is relatively insignificant compared with the circulation which can be certified by the Audit Bureau of Circulation. The pricing of the paper is, therefore, and must be, carefully balanced against the effects on advertising circulation.

Statistics accumulated by the Association from its members indicate that any upward change in price

---

[5] *The Richmond* (Va.) *Times-Dispatch*, Milline Rates and What They Mean, 1956 (unpublished pamphlet).

normally results in a substantial drop in circulation. The Association's survey of 1966 increases in circulation prices, based on replies from 1,322 daily newspapers in the United States, Puerto Rico, Canada, West Indies and Bermuda showed that of 335 newspapers who reported price increases and their effects during the year, 42% (141) lost circulation. These losses were typically around 10%, and 36% of those who reported circulation decreases were unable to recover any of their loss during the year. Seventy percent failed to recoup more than half of their circulation loss.[6]

These statistics indicate that accompanying any price increase is an approximately 50% risk of a cir-

---

[6] American Newspaper Publishers Association, Gen. Bulletin, Feb. 8, 1967, at 56. Individual instances may be helpful:

In 1957, the *Toronto* (Ont.) *Star* abruptly raised its price from 5¢ to 10¢. The *Star* suffered 97,000 cancellations the first eleven days after the price increase. A year later, the *Star's* circulation had still failed to recover. EDITOR & PUBLISHER, May 16, 1964, at 82.

On February 3, 1958, the Jeannette (Pa.) *News-Dispatch* increased its price from 5¢ to 7¢. Weekly home delivery became 35¢ instead of 25¢. At the end of six months, circulation had dropped from 10,374 to 9,450 (approximately 9%). At the end of a year, less than half this loss had been regained. International Circulation Managers Ass'n, Bulletin, Sept., 1959, at 11.

On April 4, 1960, the *Atlantic City* (N.J.) *Press* raised the price of its daily paper from 5¢ to 7¢ home delivery, and 10¢ on newsstands. At the end of a year, circulation was still off 2.6%. EDITOR & PUBLISHER, Oct. 29, 1960, at 30.

By the same token, price decreases had equally powerful effects, when production cost factors permitted them:

On October 10, 1898, the *New York Times* reduced its price from 3¢ to 1¢, and is reported to have tripled its circulation. LEE, THE DAILY NEWSPAPER IN AMERICA 272 (1937).

culation loss substantial enough to affect advertising rates: At the average rate of $.348 per line for a newspaper of 100,000 circulation, a loss of 10,000 in circulation would place the newspaper in competition with the newspapers averaging $.322 per line.[7]

The considerations underlying newspaper pricing policy are clearly more complex than balancing increased sales revenue against decreased market demand. There is a third factor present which must be carefully considered before any increase in price is envisioned because of its drastic effect on total revenue. Frequently, newspapers undertake carefully planned promotion campaigns to prepare readers for a circulation price increase. Such promotion is started well in advance of the scheduled increase, and continues after the increase becomes effective.[8]

This advertising factor which constitutes such an important desideratum for newspapers, is outside the interest or consideration of distributors. Almost wholly lacking, therefore, is that basic identity of interest between manufacturer and dealer which is usually found in the common goal of maximum sales revenue. In this essential feature, the case now before the Court differs from all those cited by the Petitioner herein.

---

[7] *The Richmond* (Va.) *Times-Dispatch,* Milline Rates and What They Mean, *supra.* At this rate, moreover, the Advertiser is also paying a higher rate "per line per thousand circulation." At 100,000 circulation, the "milline" rate is $3.48; at 90,000, even with the reduced charge, the cost to the advertiser becomes $3.58 per line per thousand circulation. *Ibid.*

[8] See American Newspaper Publishers Association Circulation Bulletin, Feb. 13, 1963, at 23 (relating to *Roanoke* (Va.) *Times* and *World News* and *id.,* Aug. 22, 1962, at 37 (relating to *Portland* (Me.) *Press Herald and Express*).

ARGUMENT

I.

THE HERALD COMPANY'S CONDUCT DID NOT COERCE THE PETITIONER OR OTHERWISE OPERATE IN RESTRAINT OF TRADE.

1. A Supplier's Cessation of Business With a Dealer Who Has Instituted Suit Against It Does Not Violate Section 1 of the Sherman Act

It must be pointed out at the outset that the Respondent, The Herald Company, did not terminate dealing with the Petitioner Albrecht for his insistence on charging subscribers more than the published subscription rates. To the contrary, the Respondent continued to supply Petitioner with newspapers despite his pricing policies, and Petitioner does not allege that Respondent either threatened or intended to terminate dealings with him until the Petitioner filed suit in the District Court for the Eastern District of Missouri. This occurred on August 12, 1964, nearly three years after Respondent had become aware of, and objected to, Albrecht's undesirable delivery charges. And it was not until more than a week after, or August 21, 1964, that the Herald gave Albrecht sixty days notice of termination.

It is firmly established that a person may discontinue business relations with one who has brought suit against him. Certainly the good faith and understanding necessary to mutually beneficial business relations cannot be sustained where differences have come to the point of litigation. And so the courts have repeatedly held that to terminate dealing because of a suit does not constitute a violation of the antitrust laws of the United States. See *Dart Drug Corp. v. Parke, Davis & Co.*, 344 F.2d 173 (D.C. Cir. 1965);

House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867 (2d Cir. 1962).

In fact, the *unilateral* cessation of business with a dealer is not illegal under section 1 of the Sherman Act, even if motivated by a desire to punish for price cutting "or anything else, however reprehensible." See *Dart Drug Corp. v. Parke, Davis & Co., supra*, at 186. But it must be emphasized that that is not the case before this Court.

2. The Publication of Carrier Delivery Rates Does Not Constitute a Violation of Section 1 of the Shermant Act

Pursuant to the economic importance of circulation, as opposed to circulation revenue, newspapers retain an exceptional interest in the ultimate price of its service to the consumer, which interest is different in kind from that of any other business. The publishing of subscription and carrier delivery rates has been a part of the newspaper business since its inception. In conformance with this practice, The Herald Company published rates, and upon receiving complaints from subscribers on Petitioner's route, urged the Petitioner not to charge more than such rates.

The holding of *United States v. Colgate & Co.*, 250 U.S. 300 (1919), at 307, clearly encompasses such conduct:

> In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.

While circumscribed by various subsequent decisions, the essence of the holding, that an individual entity may "announce in advance" the bases upon which it will enter business relations with dealers or anyone else, remains the law, as well as a fundamental precept of our "free enterprise" system.

It is firmly established that the simple announcement of suggested resale prices, even when combined with requests for compliance, is not a violation of the Sherman Act. See *Quinn v. Mobil Oil Co.*, 375 F.2d 273 (1st Cir. 1967); *Klein v. American Luggage Works, Inc.*, 323 F.2d 787 (3rd Cir. 1963); *Tobman v. Cottage Woodcraft Shop*, 194 F. Supp. 82 (S.D. Cal. 1961). In *Klein*, it was found that "prospective retailers were 'advised' of American's price maintenance policy, and its expectation that those to whom it sold its lines would not sell below pre-ticketed prices." *Klein v. American Luggage Works, Inc., supra*, at 790-91.

3. The Utilization of Additional Means of Distribution Does Not Constitute Restraint of Trade

The Petitioner had no franchise or other exclusive dealership contract. Within the area served by Albrecht, The Herald Company had customarily sold papers directly to stores and through street racks and street corner salesmen who also made some home deliveries.

As a matter of operating efficiency, newspapers generally sell to only one carrier for a given area. This custom has sometimes led to the attribution of a "value" to routes in the sale of a "going business" by one dealer to another. But this does not create a legal right to continued dealing where there is no contract. See, *e.g., Fisher v. News-Journal Co.*, 26 Del. Ch. 47,

21 A.2d 685 (1941). As pointed out above, newspapers devote great attention and spend large sums of money in building up their subscription lists, usually receiving orders from subscribers, whose names and addresses they turn over to the nearest carrier and spend large sums on promotions and securing new subscribers by other means. *Cf. Journal of Commerce Publishing Co. v. Tribune Co.,* 286 Fed. 111 (7th Cir. 1922).

In the instant case there was no contractual obligation on the part of the newspaper to continue to deal with Albrecht, nor for Albrecht to continue to deliver, or to find a substitute upon cessation. There was no agreement or obligation on the part of the Herald to refrain from selling to others in Albrecht's or any other area, whether dealers or individuals. There is no reason, contractual or otherwise, why the route in which Albrecht delivered belonged to Albrecht, or constituted a franchise or exclusive territory. In fact, it has been held that it is unlawful for dealers to conspire to prevent a newspaper from selling to competing newspaperboys within the dealer's areas. See *Evening News Publishing Co. v. Allied Newspaper Carriers,* 263 F.2d 715 (3rd Cir. 1959). As pointed out above, The Herald Company had in fact been dealing with others in the area in which Albrecht delivered, since the beginning.

Under these circumstances, The Herald Company was under no obligation to refrain from selling to persons on Route 99, either directly or through other dealers. At any time, moreover, the Herald could have ceased distribution through dealers altogether, and undertaken to accomplish circulation through its own employees. See *Graham v. Triangle Publications, Inc.,* 233 F. Supp. 825 (E.D. Pa. 1964), *aff'd per*

curiam, 344 F.2d 775 (3rd Cir. 1965). If a business' substitution of an exclusive dealership for multiple dealerships is not a contract in restraint of trade, how much less so when multiple dealerships are substituted for an exclusive. Cf. Fulda, *Individual Refusals to Deal,* 30 LAW & CONTEMP. PROB. 590, 598 (1965).

Manufacturers must be free to discontinue dealing, even to refuse renewal of franchises, when they cannot count on identity of interest with their dealers. Fulda, *supra,* at 606. It is thus settled that manufacturers may dismiss dealers who sell competing products and otherwise dissipate their selling efforts. See e.g., *Journal of Commerce Publishing Co. v. Tribune Co.,* 286 Fed. 111 (7th Cir. 1922); *Deltown Foods, Inc. v. Tropicana Prods., Inc.,* 219 F. Supp. 887 (S.D.N.Y. 1963). Where a dealer pushes a competing brand, or fails to maintain minimum sanitary or display standards, the competitive order is not endangered but likely to be enhanced by permitting the manufacturer to insist that his dealers consider his products as their primary responsibility, or otherwise meet his standards. A manufacturer is not required to retain dealers "with divided loyalties adverse to his interests."

There is a comparable opposition of loyalties and adversity of interest where a carrier insists upon charging subscribers more than the amount considered optimal for maximum circulation by the newspaper. Unless offset by alternative outlets, such overcharging creates chaos in the circulation system. Where the practice of route zones exists, one subscriber on one side of a street may be required to pay one price, while across the street his neighbor may pay much

less. Newspapers must be permitted to determine whether a carrier's price increase is for the carrier's benefit at the newspaper's expense, or whether such increase is justified by economic conditions in the area which would confront any carrier.

Thus, the Company could have ceased dealing with Albrecht for his refusal to adhere to the pricing policies which had effectively developed the *Globe-Democrat's* subscription lists. See *Quinn v. Mobil Oil Co., supra; Klein v. American Luggage Works, Inc., supra; Journal of Commerce of Publishing Co. v. Tribune Co., supra; Tobman v. Cottage Woodcraft Shop, supra.*

As pointed out in *Collins v. American News Co.,* 34 Misc. 260, 263, 69 N.Y. Supp. 638, 641, *aff'd mem. dec.* 68 App. Div. 639, 74 N.Y. Supp. 1123 (1901):

> The plaintiff virtually takes the selfish one-sided view that, since his business is lawful, the defendants must aid him in it, so far, at least, as to sell him their papers, even if it be to their own hurt, so long as it is to his profit. There is no view of the case in which it can be said that the defendants have been guilty of a conspiracy in restraint of trade; nor is there anything like dictation on the part of the publishers as to the manner in which the plaintiff shall conduct his business. They simply say, as they have a right to say, arbitrarily if they choose, that they will not sell their papers to the plaintiff. Doutbless the discontinuance of a supply of papers to the plaintiff will seriously injure him in his business; and, on the other hand, to continue that supply will, to some extent at least, be an injury to the publishers.

But despite Albrecht's insistence upon charging The Herald Company's subscribers more than that considered desirable by the Herald, the Herald continued

to deliver papers to Albrecht, until after Albrecht filed suit, and in no way interfered with Albrecht's business. *Cf. A-1 Business Machine Co. v. Underwood Corp.*, 216 F. Supp. 36 (E.D. Pa. 1963). Petitioner's claims of interference are belied by his admission that he ultimately sold his business for one thousand dollars more than he had paid for it, despite his loss of some 300 subscribers.

The conduct attributed to The Herald Company constitutes nothing more than that competition which the Sherman Act was designed to protect. The Herald did nothing more than any other businessman offering a service offered by others as well. It advertised its lower price. In seeking to protect its circulation, which Petitioner not only failed to increase, but to which Petitioner admits a loss of six during his dealership (Brief of Petitioner, at 7); the Herald secured the service of its public relations agent, the Milne Circulation Sales Corporation, who conducted telephone and door-to-door solicitation. The Herald also mailed letters to the residents on Petitioner's route informing them that the *Globe-Democrat* could in fact be acquired at the rates published by the newspaper.

Nothing herein constitutes coercion or "restraint of trade" as required by section 1 of the Sherman Act. The sole "restraint" of which Petitioner can complain is the Herald's establishment of alternative means by which subscribers could obtain such deliveries, and the advertising of a price lower than that charged by Albrecht. Albrecht retained his supply of papers, and remained free to meet the Herald's lower price, or rely on good will and service to justify his higher price.

Petitioner suggests no reason why he should be protected against the operation of another carrier in his territory with whom the publisher would rather deal, nor why the publisher should be forbidden from dealing directly with subscribers who do not wish to purchase from the carrier.

Whatever pressure Albrecht felt to reduce his prices was simply the pressure created by an ordinary advertising campaign on behalf of a competitive outlet. In this basic way, the instant case differs from all those cases cited by the Petitioner, and the Court of Appeals was correct in concluding that far from restraining trade, the Herald's conduct protected the public interest from the effect of monopoly. 367 F.2d at 522; see also *Lepler v. Palmer,* 150 Misc. 546, 270 N.Y. Supp. 440 (1934).

II.

SECTION 1 OF THE SHERMAN ACT PROHIBITS "CONTRACTS," "COMBINATIONS," AND "CONSPIRACIES" IN RESTRAINT OF TRADE, BUT DOES NOT PROHIBIT UNILATERAL ACTION.

Section 1 of the Sherman Act provides that

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

The following quotation gives proper emphasis to the provisions here relevant.

> As already indicated, the distinction between unilateral and collaborative or conspiratorial action is fundamental in the American antitrust system and could not be done away with without altering the Sherman Act. Indeed, it is hardly necessary to call attention to the fact that at least two independent business entities are required for

> violation of section 1, while one alone may be liable under section 2. This statutory scheme reflects a philosophy that exalts the liberty and initiative of the individual enterprise, and looks with suspicion on collective action. The latter is inherently dangerous because it represents aggregations of power that are likely to be used in a manner detrimental to the public interest. This is the ultimate reason for the necessity of drawing 'demonstrable demarcations' between individual and group conduct. Fulda, *Individual Refusals to Deal,* 30 LAW & CONTEMP. PROB. 590, 603 (1965).

The cases relied on by the Petitioner are not in point because they involved facts of conspiracy, combination, boycott, or active policing which are absent here. "Contract" may include that between manufacturer and dealer (*Simpson v. Union Oil Co.,* 377 U.S. 13 (1964)), but in the instant case there was no contract binding Albrecht as to pricing, nor even a refusal to deal without such a contract. Nor was there any "unlawful arrangement" between The Herald Company and competitors or other dealers, as existed in *Osborn v. Sinclair Refining Co.,* 324 F.2d 566 (4th Cir. 1963). Milne Circulation Sales Company was but an agent of the Herald. And the Herald's only relationship with Kroner was the turning over of subscription lists of routes already established by the Herald, for service by Kroner.

Petitioner cites *United States v. Parke, Davis & Co.,* 362 U.S. 29 (1960), as governing. (Brief of Petitioner, p. 18.) In *Parke, Davis,* however, the manufacturer had refused to deal with Dart Drug and had previously sent agents to secure agreements from all Dart's competitors, which were shown to Dart in order to obtain its adherence. Subsequently it had

obtained agreements from its wholesalers not to supply Dart Drug. This Court then said, at 45-46:

> Although Parke Davis, announced wholesalers' policy would not under *Colgate* have violated the Sherman Act if its action thereunder was the simple refusal without more to deal with wholesalers' Net Price Selling Schedule, that entire policy was tainted with the "vice of . . . illegality," . . . when Parke Davis used it as the vehicle to gain the wholesalers' participation in the program to effectuate the retailers' adherence to the suggested retail prices.

In relying on this Court's phraseology "without more" to support his proffered instructions, Petitioner overlooks the specification of the illegal combination which constituted the "more" in that case. For this reason, Petitioners' instructions were properly refused by the District Court. *Cf. Quinn v. Mobil Oil Co.,* 375 F.2d 273, 275 (1st Cir. 1967).

In *Simpson v. Union Oil Co., supra,* this Court distinguished *Colgate* by its lack of an agreement holding "only that resale price maintenance through the present, coercive type of 'consignment agreement' is illegal under the antitrust laws . . ." 377 U.S. at 24.

It has been repeatedly held that a refusal to supply is not actionable unless connected with a combination or conspiracy in restraint of trade. See, *e.g., Amplex of Maryland, Inc. v. Outboard Marine Corp.,* (1967 Trade Cases) TRADE REG. REP. ¶ 72,135 (4th Cir. 1967); *Quinn v. Mobil Oil Co., supra; Deltown Foods, Inc. v. Tropicana Prod., Inc.,* 219 F. Supp. 887 (S.D.-N.Y. 1963)

In *United States v. Colgate & Co.,* 250 U.S. 300 (1919), this Court held that where there was no con-

tract, combination or conspiracy, a manufacturer could refuse to supply a dealer who refused to abide by the manufacturer's resale prices. That decision has never been overruled, nor should it be as section 1 of the Sherman Act is now written.

In *Dart Drug Corp. v. Parke, Davis & Co.,* 344 F.2d 173 (D.C. Cir. 1965), the right of the manufacturer to unilaterally terminate supplies was upheld, even if such termination had been to punish Dart for its President's testimony in the Government's proceedings against Parke, Davis. See also *House of Materials, Inc. v. Simplicity Pattern Co.,* 298 F.2d 867 (2nd Cir. 1962).

In *Klein v. American Luggage Works, Inc.,* 323 F.2d 787 (3rd Cir. 1963), it was likewise held that a manufacturer could unilaterally terminate dealing with a retailer who charged more than the price tags fixed to the merchandise by the manufacturer.

In *Graham v. Triangle Publications, Inc.,* 233 F. Supp. 825 (E.D. Pa. 1964), *aff'd per curiam* 344 F.2d 775 (3rd Cir. 1965), a preliminary injunction against the termination of supplies to newspaper dealers who charged subscribers a service charge for home delivery was denied.

And in *Tobman v. Cottage Woodcraft Shop,* 194 F. Supp. 82 (S.D. Cal. 1961), it was held not illegal for a manufacturer of patio furniture to investigate violations of its suggested retail prices, and to terminate supply to the violating retailer. See also *Quinn v. Mobil Oil Co., supra.*

It has been remarked that

> The *Klein* opinion shows that facts like those involved in *Colgate* still happen and that the result of *Colgate* seems reasonable when applied to such

> facts unless the *Colgate* rule were to be replaced by the novel proposition that unilateral action in aid of maintaining resale prices violates section 1 of the Sherman Act. Fulda, *supra,* at 595.

Certainly where the detection of price cutting is accidental or unsolicited and solely the result of the manufacturer's own effort (*Cf. United States v. Bausch & Lomb Optical Co.,* 321 U.S. 707, 772 (1944)), unilateral refusals to deal in furtherance of resale price maintenance are still permissible. See Fulda, *supra,* at 604-05.

III.

FREEDOM OF THE PRESS INCLUDES THE RIGHT TO INSURE ECONOMIC CIRCULATION BY LEGITIMATE MEANS, AND ANY ABRIDGMENT OF THIS RIGHT IS IN VIOLATION OF THE FIRST AMENDMENT.

The first amendment of our Constitution provides that

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

This right to produce written knowledge which is thus protected from government infringement includes the right of dissemination. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Lovell v. Griffin,* 303 U.S. 444, 452 (1938). In fact, the history of the first amendment as outlined in *Grosjean v. American Press Co.,* 297 U.S. 233 (1936), indicates that it was the elimination of the threats to circulation presented by the stamp acts which was one of the principal objectives of the amendment.

In *Grosjean,* this Court struck down a license tax on the business of publishing advertising, stating

"it might well result in destroying both advertising and circulation." *Id.,* at 245. It pointed out that the underlying issue, the "taxes on knowledge" embodied in the stamp taxes on newspapers, constituted one of the principal grievances of the rebellious colonies. At 246, it stated "that the taxes had, and were intended to have, the effect of curtailing the circulation of newspapers, and particularly the cheaper ones whose readers were generally found among the masses of the people . . . ."

Obviously, pricing is of extraordinary importance to the publication of news and opinion which, unlike books, is of only fleeting value and cannot be viewed as a durable investment. As noted above, small increases may have disastrous effects on circulation, and this is true whether the increase is caused by the overcharge of a distributor, taxation, or the voluntary policy of the newspaper itself.

Thus, the right to present one's views to the public must include the right to establish the price range at which such views will be available, and the freedom to deal with those who will make such views available at that price. A dealer's practice of charging excessive rates is no less detrimental to circulation than an outright tax. In effect, it is a "tax on knowledge," and is no less injurious because privately imposed.

Certainly, if a publisher is to be prohibited from controlling the prices at which dealers will circulate his work, he *must* be free to seek alternative, cheaper means of distribution. In view of the economic dependence of newspapers on adequate circulation, it would be an abridgment of the freedom of the press to prohibit the use of published "Subscription Rates," and to prohibit Respondent from seeking alternative

outlets when circulation is threatened by dealer profit-taking.

Of course, no claim is made that newspapers are exempt from the Sherman Act. This issue is too well settled to resurect. But this Amicus respectfully submits that any construction of section 1 of the Sherman Act to prohibit the conduct in this case would constitute an abridgment of those freedoms specifically protected by the first amendment.

IV.

THE HERALD COMPANY'S CONDUCT DID NOT CONSTITUTE A "PER SE" VIOLATION; HENCE THE JURY VERDICT MUST STAND.

Petitioner asserts that the Court of Appeals was in error in holding that Respondent's conduct was not illegal "per se". The rule that price fixing constitutes a "per se" violation is not apposite to the facts in this case.

First of all, there can be no application of the rule unless the record clearly shows that there has in fact been price fixing. This requires an element of coercion or compulsion which is simply not present in the instant case. See Argument I, *supra*. As pointed out by the Court of Appeals, 367 F.2d at 525,

> A common sense consideration of the record evidence compels the conclusion that Globe-Democrat's action in providing competition did not remotely restrain trade, but, contrarily, fostered competition . . . .

The Petitioner at all times remained free to charge what he wished. Completely absent is that bludgeon of discontinuance which underlies the "per se" cases in this field.

Secondly, there must have been a finding of combination or conspiracy before there can be any "per se" violation of a statute which prohibits only concerted, as opposed to unilateral action. The "per se" illegality of price fixing depends upon a finding of combination or conspiracy. The existence of such a combination or conspiracy is a question of fact for the jury. *Cf. Julius M. Ames Co. v. Bostitch, Inc.,* 240 F. Supp. 521, 528 (S.D.N.Y. 1965) In the instant case, this issue has been decided against the Petitioner, and that decision is final. Where there is an evidentiary basis for the jury's verdict, the jury is free to disregard or disbelieve whatever facts are inconsistent with its conclusion, and only where there is a complete absence of probative facts to support the conclusion drawn by the jury is it reversible error to overrule a motion for judgment notwithstanding the verdict. 5 Am. Jur. 2d., *Appeal & Error* § 819 (1962); see Fed. R. Civ. P. 52(a).

Petitioner objects to the District Court's instruction attempting to make the word "combination" meaningful to the jury. Certainly the court's reference to "common purpose" is fully warranted by the accepted meaning of the word which must be taken to have been the meaning intended by Congress. See Meriam-Webster New International Dictionary 533 (2d ed. 1951) ("combine . . . 2. Specif., to form a union for a common end or purpose; to confederate"). And certainly the Petitioner cannot complain that the valid substance of his proferred instructions was not adequately covered by that court's ample instructions. See 367 F.2d at 520.

Finally, the rule that price fixing is a "per se" violation is not of universal applicability. Under unusual circumstances, whether relating to the character

or to the effect of the arrangement, it is held that an agreement affecting prices is not an undue restraint of trade. *Cf. Board of Trade* v. *United States,* 246 U.S. 231 (1918); *Bailey's Bakery, Ltd. v. Continental Baking Co.,* 235 F. Supp. 705, 720-23 (D. Hawaii 1964). It is submitted that the peculiar circumstances of this case present such a situation. These circumstances include the history of newspaper and periodical pricing, the newspaper's effort and investment in the development of subscription lists, the economic importance of pricing policy to newspapers resulting from low circulation revenue and the relation of circulation volume to advertising revenue, the ambiguous nature of the conspiracy and restraint charged, and the considerations raised by the first amendment's guarantee of unfettered circulation.

CONCLUSION

Unlike any of the businesses involved in cases cited by the Petitioner, newspapers are economically dependent upon a factor in which dealers are in no way interested—advertising. Because advertising rates depend on circulation, newspapers' interest in quantity of circulation is an interest different in kind from that of the dealer.

Despite this importance of pricing, The Herald Company did not refuse to deal with Petitioner for his insistence upon charging rates in excess of those considered optimal by the newspaper. There was no refusal to deal until after Petitioner filed suit. Prior to this the Herald merely attempted to establish alternate means to make the *Globe-Democrat* available to its subscribers at the suggested rate.

While a refusal to deal unless the buyer join the seller in a contract violative of the Sherman Act may

be illegal, we have here only a threat to establish an additional outlet, that is, to compete, should the dealer refuse. The dealer was no more coerced in his pricing policy than any dealer threatened by competition. All competition creates a pressure to conform to the lower price; the question is whether an unlawful *pressure* has been created.

Agreeing to sell at the suggested price was not a condition to dealing, as shown by Petitioner's three year record of overcharging without interruption of supply. Those who indicated they would comply were not bound to do so, but could change their prices at will, although it is established that the newspaper might then deal or not deal with them as its policy then dictated. Petitioner has proven neither "contract," "conspiracy" or "combination," nor "restraint of trade," as required by section 1 of the Sherman Act.

In fact, the gravamen of Petitioner's complaint is simply that The Herald Company refused to act in concert with him in his desire to create a monopoly. It is respectfully submitted that the opinion of the Court of Appeals for the Eighth Circuit should be affirmed.

Arthur B. Hanson
J. Dapray Muir
Hanson, Cobb, O'Brien & Tucker
888 Seventeenth Street, N. W.
Washington, D. C. 20006

Attorneys for Amicus Curiae American Newspaper Publishers Association